

1-1968

The Validity of San Francisco's Commuter Tax

Helen Culiner

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Helen Culiner, *The Validity of San Francisco's Commuter Tax*, 20 HASTINGS L.J. 813 (1968).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol20/iss2/18

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

THE VALIDITY OF SAN FRANCISCO'S COMMUTER TAX

On August 19, 1968, the San Francisco Board of Supervisors passed an ordinance imposing a license tax on all nonresidents employed in San Francisco.¹ The ordinance imposes a tax of one percent upon the gross income earned by the nonresident in the city.² The discussion in this note is confined to the validity of the tax itself³ under the law of municipal home rule in California and the provision for equal protection in the federal⁴ and state⁵ constitutions. The discussion is circumscribed by the basic proposition that the ordinance, as stated on its face,⁶ is a revenue-raising measure.

Municipal Home Rule

The fundamental premise of home rule in California is that a chartered city⁷ derives its power to legislate from a direct constitutional grant and, within the framework of the power granted, is an autonomous political entity. The pertinent constitutional provisions

¹ San Francisco, Cal., Ordinance 246-68, Aug. 19, 1968. The preamble provides in part: "An Ordinance Providing For The Imposition Of License Fees For The Privilege Of Engaging In Occupations, Trades And Professions In The City And County Of San Francisco By All Non-Resident Persons Employed By Others" The tax imposed by ordinance is popularly referred to as the "commuter tax". The ordinance will be referred to as the "commuter tax ordinance" or the "San Francisco ordinance" in the body of the text.

² *Id.* § 2: "license fees shall be measured by one percent (.01) of the gross receipts of each such person" It is interesting to note the phraseology in reference to "gross receipts". The measure of the tax is wages and salaries which generally would be termed "gross income".

³ The implementing provisions, which include apportionment, employer withholding, administration, savings clause and penalties, will not be discussed. See generally *id.* §§ 3, 4, 6, 12, 13.

The assumption made by this writer is that should any of these clauses be invalid, they will be held to be severable. See, e.g., *People v. Evans*, 249 Cal. App. 2d 254, 57 Cal. Rptr. 836 (1967) (penalty provision in hotel occupancy tax severable).

⁴ U.S. CONST. amend. XIV, § 1.

⁵ CAL. CONST. art. I, § 21.

⁶ San Francisco, Cal., Ordinance 246-68, preamble, Aug. 19, 1968.

⁷ The California constitution provides for three categories of cities; charter cities, general law cities, and cities created by special legislative enactment prior to the adoption of the state constitution. See Peppin, *Municipal Home Rule in California*: 1, 30 CAL. L. REV. 1 (1941). Under the constitution a general law city has the authority to "make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws." CAL. CONST. art. XI, § 11.

are sections 6 and 8 of article XI, in which chartered cities are given the power "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters"⁸ That the grant of power is to be exercised only in municipal affairs is emphasized by the further qualification that "in respect to other matters they [chartered cities] shall be subject to and controlled by general laws"⁹ Section 6 extends to the chartered city the privilege of accepting this grant of power. Section 8 makes it competent for any city, in its charter, to limit the privilege thus extended.¹⁰

Once it is determined that a particular subject matter is a municipal affair, municipal legislation on the subject is paramount to that of the state¹¹ and is limited only by the city charter and the Constitution.¹² Conversely, where the subject matter is one of statewide concern, state law is paramount and the charter city is subject to and controlled by the state legislation.¹³ San Francisco, a charter city, has accepted this autonomy or home rule in municipal affairs.¹⁴

Municipal Power to Tax

From an early date, the California courts have consistently held that the direct constitutional grant of home rule confers upon the charter cities the power of taxation for revenue purposes.¹⁵ The supreme court in *Ex parte Braun*¹⁶ found this power "too obvious to merit discussion."¹⁷ A statement by Mr. Justice Field in an 1878 United States Supreme Court decision¹⁸ is frequently cited by the California courts as expressing their attitude toward municipal taxation:

When such a [municipal] corporation is created, the power of taxation is vested in it, as an essential attribute, for all purposes of its existence, unless its exercise be in express terms prohibited. . . . A municipality without the power of taxation would be a body without life, incapable of acting and serving no useful purpose.¹⁹

⁸ CAL. CONST. art. XI, §§ 6, 8.

⁹ *Id.*

¹⁰ See *West Coast Advertising Co. v. San Francisco*, 14 Cal. 2d 516, 522-523, 95 P.2d 138, 142-43 (1939).

¹¹ *E.g., Ex parte Braun*, 141 Cal. 204, 74 P. 780 (1903).

¹² *E.g., West Coast Advertising Co. v. San Francisco*, 14 Cal. 2d 516, 95 P.2d 138 (1939).

¹³ *E.g., Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942); *Ex parte Daniels*, 183 Cal. 636, 192 P. 442 (1920).

¹⁴ SAN FRANCISCO, CAL., CHARTER § 2 (1932).

¹⁵ *E.g., Ex parte Braun*, 141 Cal. 204, 74 P. 780 (1903). The general law city derives its revenue licensing power from a legislative grant. CAL. GOV'T CODE § 37107. ("The legislative body may license for revenue and regulation").

¹⁶ 141 Cal. 204, 74 P. 780 (1903).

¹⁷ *Id.* at 209, 74 P. at 782.

¹⁸ *United States v. New Orleans*, 98 U.S. 381 (1878).

¹⁹ *Id.* at 393.

The extent of the constitutional grant of taxing power to California charter cities has been discussed in several cases. *West Coast Advertising Co. v. San Francisco*²⁰ involved the limiting effect of the San Francisco charter on the city's power to levy license taxes. It was contended that, since the charter expressly provided for licensing for regulatory purposes,²¹ it necessarily precluded licensing for revenue purposes. The supreme court rejected this contention and held that any power granted by the constitution, and not *expressly* limited by the charter, may be exercised by the municipality.²²

In *Ainsworth v. Bryant*,²³ the validity of a municipal tax on the sale of liquor was questioned on the ground that the control, regulation and taxation of alcoholic beverages had been placed exclusively under the power of the state. An amendment to the constitution had been adopted in 1932 to provide:

The State of California . . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State The State Board of Equalization shall have the *exclusive* power to license the manufacture, importation and sale of intoxicating liquors . . . and to collect license fees or occupation taxes on account thereof²⁴

There was no question that, being later in time, the constitutional provision operated to modify the home rule grant.²⁵ Nevertheless, the court held that where a matter is removed from the realm of municipal affairs to one of statewide concern by a constitutional amendment affecting municipal power to tax for revenue purposes, the amendment controls only in the *express* field it covers. The Alcoholic Beverages Control Act²⁶ passed by the legislature pursuant to the 1932 amendment was primarily a regulatory measure. The court held that no implication would be made from the grant of regulatory power so as to invade "the plenary power of *taxation* possessed by a chartered municipality."²⁷

The further problem presented by the grant of taxing power and the inclusion of two sections dealing with taxes in the state legislation was disposed of by a classification of the taxes. The court defined the state tax as an excise tax imposed upon the merchant for the privilege of selling his wares, and the municipal tax as a tax levied on the sale of the wares and paid by the consumer. The municipal tax was thus held to be a valid exercise of municipal power of taxation for revenue purposes.²⁸

²⁰ 14 Cal. 2d 516, 95 P.2d 138 (1939).

²¹ SAN FRANCISCO, CAL., CHARTER § 24 (1932).

²² 14 Cal. 2d at 525, 95 P.2d at 144.

²³ 34 Cal. 2d 465, 211 P.2d 564 (1949).

²⁴ CAL. CONST. art. XX, § 22 (emphasis added).

²⁵ *Ainsworth v. Bryant*, 34 Cal. 2d 465, 472, 211 P.2d 564, 568 (1949).

²⁶ CAL. BUS. & PROF. CODE §§ 23000-23047.

²⁷ *Ainsworth v. Bryant*, 34 Cal. 2d 465, 473, 211 P.2d 564, 569 (1949) (emphasis added).

²⁸ *Id.* at 473, 211 P.2d at 569.

The above cases indicate a judicial acceptance of municipal sovereignty in the area of taxation, predicated upon the constitutional grant of home rule. The principle from which this broad power of taxation stems was clearly stated by the supreme court in *Ex parte Braun*:²⁹

It is of course true that the local power of taxation, like all other local powers, must have its origin in a grant by the state, and that it may at all times be controlled by the sovereign power. But it does not follow that the legislative department of the state may so control it. In the absence of constitutional provisions relating to the subject, the legislative department would have unlimited sway, and could, for the state, confer, modify, or withdraw the power and prescribe such regulations as it saw fit for its exercise. The state constitution is, however, the highest expression of the will of the people of the state, and so far as it speaks, represents the state. . . .

The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not find its source in any grant by the legislature. . . . Such power has been directly granted by the people of the state by the provisions of the state constitution.³⁰

The doctrine of an "inherent" power of municipal taxation is not a generally accepted proposition and may be unique to California.³¹ It is beyond the scope of this note to make a comparative analysis of city tax measures in other states. To be meaningful, such a discussion would have to include a careful appraisal of the constitutional provisions and legislative measures of the particular state in which each municipal ordinance was enacted. Under California law, however, the imposition by San Francisco of a license tax for revenue purposes is clearly within the city's taxing power.³²

Classification of the Commuter Tax

Although the power to levy license taxes for revenue purposes is beyond dispute,³³ the question of whether or not a charter city has the power to levy an "income tax" has not been before the California courts. Insofar as the license exacted by the commuter tax is measured by income, the tax is a percentage of the monetary proceeds of labor and takes on a characteristic of an "income tax."³⁴ Insofar as it is directed against a "privilege," it is a "license tax."³⁵

Similar taxing measures have been classified in other jurisdictions

²⁹ 141 Cal. 204, 74 P. 780 (1903).

³⁰ *Id.* at 211-12, 74 P. at 783.

³¹ Antieau, *Municipal Power to Tax—Its Constitutional Limitations*, 8 VAND. L. REV. 698 (1955).

³² *E.g.*, *West Coast Advertising Co. v. San Francisco*, 14 Cal. 2d 516, 95 P.2d 138 (1939); *Franklin v. Peterson*, 87 Cal. App. 2d 727, 197 P.2d 788 (1948).

³³ *See, e.g.*, *West Coast Advertising Co. v. San Francisco*, 14 Cal. 2d 516, 95 P.2d 138 (1939).

³⁴ *Louisville v. Sebree*, 308 Ky. 420, 429, 214 S.W.2d 248, 253 (1948).

³⁵ *Id.* at 429, 214 S.W.2d at 254.

both as an "income tax" and as a "license tax" in order to sustain their validity.³⁶ Two questions are raised by this problem of tax classification: (1) Does a charter city have the power to levy an "income tax"? (2) Will the California courts classify the ordinance as an "income tax" or as a "license tax"?

Power to Levy an "Income Tax"

Section 11 of article XIII of the California Constitution provides:

Income taxes may be assessed to and collected from persons, corporations, joint stock associations, or companies resident or doing business in the State, or any one or more of them, in such cases and amounts, and in such manner, as shall be prescribed by law.

Section 13 of article XIII gives the legislature power "to pass all laws necessary to carry out the provisions of this article." Pursuant to this authority, the legislature in 1935 enacted a comprehensive scheme of income tax legislation. Included in this legislation is a provision³⁷ prohibiting the levy of an "income tax" by any municipality. Section 17041.5 of the Revenue and Taxation Code states:

Notwithstanding any statute, ordinance, regulation, rule or decision to the contrary, no city, county, city and county, governmental subdivision . . . whether chartered or not, shall levy . . . any tax upon the income, or any part thereof, of any person, resident or nonresident.

That the legislative intent is to prohibit the levy on an "income tax" is quite clear. Section 17041.5 further reads:

This section shall not be construed so as to prohibit the levy or collection of any otherwise authorized license tax upon a business measured by or according to gross receipts.

Under the principles of constitutional home rule, the validity of a municipal "income tax" would depend on judicial willingness to include in the municipal power to tax for revenue purposes the power to levy "income taxes" as well as "license taxes." The effectiveness of the legislative prohibition of a municipal "income tax" is uncertain without judicial interpretation and construction of the constitutional provision involved. The purpose of section 11 of article XIII was to provide for a special and distinct form of taxation since, under the California constitution, if "income taxes" were deemed to be taxes on income, as property, a graduated income tax would be unconstitutional.³⁸ What the section accomplished was to provide for the consti-

³⁶ *Howard v. Commissioners of Louisville*, 344 U.S. 624, 629 (1953) (Louisville occupation tax measured by earnings or profits held to be an "income tax" for the purposes of the Buck Act); *Louisville v. Sebree*, 308 Ky. 420, 214 S.W.2d 248 (1948) (the Louisville occupation tax was not an "income tax" within the meaning of the Kentucky Constitution); *Dole v. Philadelphia*, 337 Pa. 375, 11 A.2d 163 (1940) (similar measure held to be an "income tax"). *But cf. Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 653, 203 S.W.2d 438, 440 (1947).

³⁷ CAL. REV. & TAX. CODE §§ 17001-19500.

³⁸ Traynor & Keesling, *The Scope and Nature of the California Income Tax*, 24 CALIF. L. REV. 502-04 (1936).

tutionality of "income taxes" in California.³⁹ Section 11 does not, by its *express* terms, prohibit the levy of "income taxes" by municipalities and hence, the charter city could be deemed to have the power within the home rule grant.⁴⁰

That this would be the judicial determination of a municipal "income tax", however, seems highly unlikely. The constitutional authority, the comprehensiveness of the state legislation and the legislative intent combine to form strong opposition to what would be, in effect, an expansion of the presently operative and judicially determined power of municipal taxation by the inclusion within it of the power to impose "income taxes."

"Income Tax" or "License Tax"?

Judicial classification of taxing measures is predicated upon the uniformly accepted rule that the character of any given tax will be determined from its incidents and from the natural and legal effect of the language used.⁴¹ A "license tax" is directed against the right to dispose of property, to pursue a business, occupation or calling, or to *exercise a privilege*.⁴² An "income tax" is directed against the acquisitions of the taxpayer arising from many sources including the pursuit of an occupation, trade or calling.⁴³

The plain meaning of the language of the commuter tax ordinance is to impose a license fee on the privilege of employment. The extent to which the privilege will be taxed is measured by gross earnings, but the measure of the tax does not determine its character. Thus, a privilege tax does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege that is taxed.⁴⁴ A corporation franchise tax does

³⁹ *Id.* at 505-06.

⁴⁰ See notes 27-28 *supra* and accompanying text. Further support for its reluctance to limit municipal taxing power was found by the court by reference to other constitutional provisions: "Where the power of taxation has been lodged in the state to the exclusion of municipalities and other entities of that character, it has customarily been done by specific language expressive of such purpose. . . . Thus in 1933 . . . there were two amendments to article XIII, sections 14 and 16, vesting an exclusive power of taxation in the state over "insurance companies" and "banks" respectively, by expressly providing it to be "in lieu of all other taxes" *Ainsworth v. Bryant*, 34 Cal. 2d 465, 472, 211 P.2d 564, 568 (1949).

⁴¹ *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292 (1931); *Douglas Aircraft v. Johnson*, 13 Cal. 2d 545, 550, 90 P.2d 572, 575 (1939); *Ingels v. Riley*, 5 Cal. 2d 154, 159, 53 P.2d 939, 942 (1936).

⁴² See *Ingels v. Riley*, 5 Cal. 2d 154, 157, 53 P.2d 939, 942 (1936).

⁴³ *Poorman v. State Bd. of Equalization*, 99 Mont. 543, 554, 45 P.2d 307, 312 (1935).

⁴⁴ *Ingels v. Riley*, 5 Cal. 2d 154, 160, 53 P.2d 939, 942 (1936). *South Coast Fisheries, Inc. v. Department of Fish & Game*, 213 Cal. App. 2d 325, 330, 28 Cal. Rptr. 537, 540, *appeal dismissed*, 375 U.S. 57 (1963) (failure to state a federal question).

not become an income tax because it is measured by net income.⁴⁵

In *Franklin v. Peterson*⁴⁶ a gross receipts occupation tax was challenged by an attorney on the ground that the city had no legal authority to impose a license tax on occupations licensed by the state. The court pointed out that the occupation tax was levied on the business of practicing law rather than on the person because he was an attorney,⁴⁷ and the further contention that the occupation tax was an "income tax" was summarily dismissed:

A long line of decisions rendered in this state has sustained the validity of gross receipts taxes, and furthermore a gross receipts occupation tax is not an income tax.⁴⁸

The contention must be met that the ordinance is worded as a license tax in order to avoid the absence of power to impose an income tax.⁴⁹ But because of the numerous California decisions sustaining occupation and privilege taxes, there is little likelihood that the language of the ordinance will be disregarded in order to sustain a contention of subterfuge.⁵⁰

Municipal Affairs

In the context of what has been said thus far, a narrow question presents itself: Has there been a change in California in the judicial approach to municipal home rule that would permit the court to encroach upon the "absolute power of taxation" doctrine so as to invalidate the commuter tax ordinance?

The cases are consistent in carefully pointing out that the initial determination of the validity of a chartered city's legislation turns on whether the subject matter is a municipal affair.⁵¹ Since the constitution fails to define the term, it has been for the courts to make the determination of what is a municipal affair, predicated on the facts and circumstances of each case.⁵² The term has been narrowly

⁴⁵ *Rosemary Properties, Inc. v. McColgan*, 29 Cal. 2d 677, 681, 177 P.2d 757, 760 (1947).

⁴⁶ 87 Cal. App. 2d 727, 197 P.2d 788 (1948).

⁴⁷ *Id.* at 731, 197 P.2d at 790.

⁴⁸ *Id.* at 733, 197 P.2d at 792.

⁴⁹ On September 13, 1968, the counties of Alameda, Contra Costa, Marin, San Mateo and Santa Clara filed a complaint for injunction and declaratory relief in the Sonoma County Superior Court. The argument is made that the tax is an income tax in the guise of a license tax. Points and Authorities for Plaintiff at 7-9, *Alameda County v. San Francisco*, No. 60398 (Super. Ct., Sonoma County, Cal., Sept. 13, 1968). The following are included as incidents of an income tax: (1) It is directed at persons, not employment; (2) it is measured by income; (3) it is a substantial burden and nonresident employees earning less than \$4000.00 annually are excluded. *Id.* at 8.

⁵⁰ *E.g.*, *West Coast Advertising Co. v. San Francisco*, 14 Cal. 2d 516, 95 P.2d 138 (1939); *Ingels v. Riley*, 5 Cal. 2d 154, 53 P.2d 939 (1936).

⁵¹ *E.g.*, *Pacific Tel. & Tel. Co. v. San Francisco*, 51 Cal. 2d 766, 767, 336 P.2d 514, 515 (1959).

⁵² *In re Hubbard*, 62 Cal. 2d 119, 128, 396 P.2d 809, 814, 41 Cal. Rptr.

construed and repeatedly modified with such words as "strictly,"⁵³ "internal"⁵⁴ and "exclusively."⁵⁵ The concept is not based on any fixed rules; it changes as conditions change. In 1959, the California Supreme Court, in overruling a District Court of Appeal decision⁵⁶ that had sustained the maintenance of poles, wires and other telephone equipment as a municipal affair, had this to say:

[T]he constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state.⁵⁷

Although the exercise of municipal taxing power has consistently been construed as a "strictly . . . municipal affair,"⁵⁸ the levying of the tax on nonresidents to the exclusion of residents brings into play this "changing concept of municipal affairs." The state legislature has clearly indicated that it considers this tax to be a matter of statewide concern. In July, 1968, section 50026 was added to the Government Code:

The legislative body of any local agency, chartered or general law, which is otherwise authorized . . . to impose any tax on the privilege of earning a livelihood by an employee . . . shall not impose any such tax . . . when such employee is not a resident of the taxing jurisdiction, unless the same tax . . . at the same rate . . . is imposed on the earnings of all residents of the taxing jurisdiction who are employed therein.

Under the principles of home rule, it is obvious that this legislation is not effective to preclude San Francisco from levying the commuter tax. It is effective, however, to show that the state considers the commuter tax to be a matter of interest to it and not a matter exclusively of municipal concern. A further provision indicates that the commuter tax ordinance offends state policy:

The Legislature finds and declares that the right of citizens of California to move freely about the state in search of employment is a matter of statewide interest and concern. Any unnecessary barriers which impede the mobility of citizens of this state or limit their choice of employment are contrary to state policy. An *occupation* tax

393, 398 (1964); *Professional Fire Fighters, Inc. v. Los Angeles*, 60 Cal. 2d 276, 294, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 840 (1963); *Redwood City v. Moore*, 231 Cal. App. 2d 563, 577, 42 Cal. Rptr. 72, 82 (1965).

⁵³ *E.g.*, *In re Novak*, 184 Cal. 701, 704, 195 P. 402, 403 (1921).

⁵⁴ *E.g.*, *Wilton v. Henkin*, 52 Cal. App. 2d 368, 372, 126 P.2d 425, 427 (1942).

⁵⁵ *E.g.*, *Simpson v. Los Angeles*, 40 Cal. 2d 271, 277-78, 253 P.2d 464, 468 (1953).

⁵⁶ *San Diego v. Southern Cal. Tel. Co.*, 92 Cal. App. 2d 793, 208 P.2d 27 (1949).

⁵⁷ *Pacific Tel. & Tel. Co. v. San Francisco*, 51 Cal. 2d 766, 771, 336 P.2d 514, 517 (1959).

⁵⁸ *Ainsworth v. Bryant*, 34 Cal. 2d 465, 469, 211 P.2d 564, 566 (1949); *accord*, *West Coast Advertising Co. v. San Francisco*, 14 Cal. 2d 516, 524, 95 P.2d 138, 143 (1939).

on employees measured by income which is not borne equally by residents and nonresidents of a taxing jurisdiction would be such a barrier.⁵⁹

Should the court agree, it has the discretion to determine that this particular taxing measure is not a municipal affair. The California Supreme Court has taken judicial notice of the rapid growth of suburban areas in California and the high rate of mobility of the citizens of the state.⁶⁰ The "commuter," as a member of these suburban communities, can certainly be deemed a subject of statewide rather than local concern. But to make the determination that a taxing ordinance for the purpose of raising revenue is not a municipal affair would be a radical departure from previous decisions. The more likely result is that the court will find the commuter tax ordinance invalid by applying to it the principles of preemption.

The Preemption Doctrine

The constitutional provisions relating to charter and general law cities are not identical in their terminology. The charter city, in matters that are *not* municipal affairs, is "subject to" the general laws.⁶¹ The general law city is limited to "all such local, police, sanitary and other regulations as are not in conflict with the general laws."⁶² It is from the "conflict with the general laws" that the doctrine of preemption has evolved.⁶³ Under these provisions, the doctrine is brought into play when a general law city creates a conflict by attempting to legislate regarding a subject upon which the state has already acted. The conflict is resolved in favor of the state when the state legislation expressly prohibits what an ordinance authorizes, or shows an intent to "occupy the field."⁶⁴

The doctrine of preemption is not applicable, however, to a charter city ordinance on a subject matter that is not a municipal affair.⁶⁵ When the subject is of statewide concern, there is no question of conflict, and the city is subject to the state law.⁶⁶ This distinction is subscribed to by the supreme court, but its application is limited to revenue raising measures. As to ordinances enacted for purposes of regulation, the doctrine of preemption, in effect, has operated to eliminate any real distinction between charter and general law cities.

⁵⁹ Cal. Stats. 1968, ch. 559, § 3, at 1014, adding CAL. GOV'T CODE § 50026 (emphasis added).

⁶⁰ *In re Lane*, 58 Cal. 2d 99, 111, 372 P.2d 897, 904, 22 Cal. Rptr. 857, 864 (1962) (concurring opinion).

⁶¹ CAL. CONST. art. XI, § 6.

⁶² *Id.* art. XI, § 11.

⁶³ Comment, *The California City versus Preemption by Implication*, 17 HASTINGS L.J. 604 (1966).

⁶⁴ *Id.* at 605.

⁶⁵ *In re Hubbard*, 62 Cal. 2d 119, 127, 396 P.2d 809, 814, 41 Cal. Rptr. 393, 398 (1964).

⁶⁶ *Id.*

For example, in *Professional Fire Fighters, Inc. v. City of Los Angeles*,⁶⁷ the point in issue was whether the state legislation relating to the organizational rights of fire fighters was binding on a charter city. The court was careful to point out that the *only* question was whether the subject matter of the state legislation was or was not a municipal affair; the doctrine of preemption clearly being inapplicable.⁶⁸ The court further concluded, however, that the determination of what is or is not a municipal affair was to be made not only from the facts and circumstances of each case, but from the "legislative purpose in each individual instance."⁶⁹ The state legislation was found to be so extensive and its purpose so clear as to require the conclusion that labor relations were exclusively a matter of state concern. The charter city, although it retained control of the fire department as such, was held to be without authority to act at all on the rights of the firemen to organize or join a union.

But if what is or is not a municipal affair is to be determined on the basis of prior state action and legislative intent, the legislature does, in effect, "confer, modify or withdraw"⁷⁰ the power of a charter city over municipal affairs granted by the constitution. The careful, analytical approach to the chartered cities becomes, fundamentally, a technical differentiation affecting only the court's initial evaluation of the issues. The outcome is determined from the principles of preemption. Further support for this statement is found in two recent cases, *In re Hubbard*⁷¹ and *In re Lane*.⁷²

In *Hubbard*, the supreme court dealt with the problem of state and municipal control in the area of gambling regulation. The basic preemption doctrine of "intent to occupy the field" was applied, and in this instance it was held that the state legislation did not show an intent to occupy the *whole* field. The ordinance, therefore, was a valid exercise of municipal police power. The court then went on to try to clarify, without expressly discarding, the distinction between the application of the doctrine of preemption to a general law city and the determination of "municipal affairs" of a charter city, pointing out that "occupation of the field, may itself become a test, though not the sole test, of whether it is or is not a municipal affair."⁷³ The court, however, set down guidelines which clearly open the door to the application of the doctrine of preemption in *any* determination of municipal affairs.

The question must be answered in the light of the facts and circum-

⁶⁷ 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

⁶⁸ *Id.* at 292 n.11, 384 P.2d at 168 n.11, 32 Cal. Rptr. at 840 n.11.

⁶⁹ *Id.* at 294, 384 P.2d at 169, 32 Cal. at 841.

⁷⁰ *Ex parte Braun*, 141 Cal. 204, 211, 74 P. 780, 783 (1903). See note 29 *supra* and accompanying text.

⁷¹ 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

⁷² 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

⁷³ *In re Hubbard*, 62 Cal. 2d 119, 127, 396 P.2d 809, 814, 41 Cal. Rptr. 393, 398 (1964).

stances surrounding each case. This does not mean that there are no standards which a chartered city or county may apply when attempting to determine its right to legislate in a specific field. Analysis of many prior decisions on this subject indicates that although the language differs from case to case, the rationale of all have one thing in common, that is, the chartered counties and cities have full power to legislate in regard to municipal affairs *unless*: (1) the subject matter has been so fully covered by the general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been *partially* covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.⁷⁴

*In re Lane*⁷⁵ invalidated a Los Angeles ordinance dealing with adult consenting sexual behavior and, in so doing, extended the doctrine of preemption to include preemption by implication: "A comprehensive and detailed general scheme, with respect to a subject, serves, without more, to occupy the field to the exclusion of local regulation."⁷⁶

It is not suggested that the doctrine of these cases will, *ipso facto*, be applied to an ordinance dealing with a tax measure for revenue purposes. Regulatory and taxing measures are distinctly separate subject matters and no California decision thus far has applied the doctrine of preemption to an ordinance levying a tax for revenue purposes. But the cases do stand for the proposition that not only will the courts, as they traditionally have, decide whether the subject matter is a municipal affair from the facts and circumstances of each case,⁷⁷ but the facts and circumstances will also determine whether state action will be applied as the determinative factor. Under this approach it would not be a radical departure for the courts to find that the "plenary power of taxation possessed by a chartered municipality"⁷⁸ does not include a tax levied exclusively on commuters. Following the *Hubbard*⁷⁹ classification, the ordinance fits quite neatly into the second category. The subject matter is partially covered by the general law of income taxation,⁸⁰ and the paramount state concern is clearly evident.⁸¹

The substantially extraterritorial effect of the ordinance operates to withdraw the measure from the traditional concepts of municipal affairs. Although the taxable event occurs within the city of San

⁷⁴ *Id.* at 128, 396 P.2d at 814-15, 41 Cal. Rptr. at 398-99 (emphasis added).

⁷⁵ 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

⁷⁶ *Id.* at 109, 372 P.2d at 903, 22 Cal. Rptr. at 863.

⁷⁷ See cases cited note 52 *supra*.

⁷⁸ *Ainsworth v. Bryant*, 34 Cal. 2d 465, 472, 211 P.2d 564, 568 (1949).

⁷⁹ *In re Hubbard*, 62 Cal. 2d 119, 128, 396 P.2d 809, 814-15, 41 Cal. Rptr. 393, 398-99.

⁸⁰ CAL. REV. & TAX. CODE §§ 17001-19500.

⁸¹ Cal. Stats. 1968, ch. 559 at 1014, adding CAL. GOV'T CODE § 50026.

Francisco, its infringement on the interests of the neighboring cities whose residents pay the tax is evident.⁸² The State Legislature has clearly enunciated its opposition to the tax measure.⁸³ A judicial evaluation of the ordinance will, of necessity, give consideration to the attitude of the legislature since it reflects matters of statewide concern. If, in balancing conflicting interests, the court should determine that the tax is a detriment to the well-being of the state, the ordinance will be invalid whether the court chooses to declare it so on the basis of paramount state concern or on the basis of preemption.

Equal Protection

Should the determination be made that under the constitutional grant of home rule San Francisco has the power to levy this tax, another constitutional problem will have to be faced. This problem involves no jurisdictional question. The power of a sovereign political entity to tax includes a tax on nonresidents on property owned and income earned within its physical boundaries.⁸⁴ Insofar as the measure levies a tax on earnings of nonresident employees, it is a discriminatory measure and, as such, raises the issue of whether it contravenes the equal protection clause of the fourteenth amendment and the comparable section of the California Constitution.⁸⁵

Residence—Interstate Discrimination

Where residence is the equivalent of citizenship, it cannot be made the basis for discriminatory legislation. In *Travis v. Yale & Towne Manufacturing Company*,⁸⁶ the United States Supreme Court invalidated a New York income tax law which discriminated against nonresidents employed in New York by allowing exemptions to residents. Because of the proximity of New York to Connecticut and New Jersey, the Court took judicial notice of the fact that "nonresidents" would, as a matter of practical necessity, include citizens of other states who, under article IV, section 2 of the Constitution, were

⁸² From 187,000 to 200,000 residents of neighboring cities will be affected by the imposition of the commuter tax. The ordinance refers to 187,600. San Francisco, Cal., Ordinance 246-68, Aug. 19, 1968. Complaint for Injunction and Declaratory Relief at 2, *Alameda County v. San Francisco*, No. 60398, (Super. Ct., Sonoma County, Cal. Sept. 13, 1968) refers to 200,000 persons.

⁸³ CAL. GOV'T CODE § 50026.

⁸⁴ *Shaffer v. Carter*, 252 U.S. 37, 54 (1920); *Arnke v. Berkeley*, 185 Cal. App. 2d 842, 847, 8 Cal. Rptr. 645, 648 (1960).

⁸⁵ CAL. CONST. art. I, § 21: "[N]or shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." This section has consistently been interpreted as having the same effect as the equal protection clause of the federal Constitution. See, e.g., *Fox Bakersfield Theatre Corp. v. Bakersfield*, 36 Cal. 2d 136, 222 P.2d 879 (1950).

⁸⁶ 252 U.S. 60, 79 (1920).

entitled to the same privileges and immunities enjoyed by the citizens of New York.

Similarly, in *Toomer v. Witsell*,⁸⁷ a South Carolina statute imposing a \$25 license fee on shrimp boats owned by residents of the state and a \$2500 fee on nonresident owners was held to be unconstitutional. The Court pointed out that article IV, section 2 does not preclude disparity of treatment where there are valid, independent reasons for it other than residence.⁸⁸ But in discerning what would be a valid, independent reason, the Court had this to say:

Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation. *But assuming such were the facts*, they would not necessarily support a remedy so drastic as to be a near equivalent to total exclusion.⁸⁹

The same reasoning applied in these holdings is encompassed by the equal protection clause. But the rationale of federalism underlying the Constitution gives added implementation to decisions involving discrimination against nonresidents. Thus, in *Wheeling Steel Corporation v. Glander*,⁹⁰ the court struck down, as violating equal protection, an Ohio tax measure that discriminated against nonresidents; whereas, in *Allied Stores of Ohio, Inc., v. Bowers*,⁹¹ another provision of the Ohio tax law, discriminating in favor of nonresidents, was held not to be offensive to the principles of equal protection on the ground that state policy of encouraging business location within the state was a valid basis for discrimination. Mr. Justice Brennan in a concurring opinion, joined by Mr. Justice Harlan, distinguished the two decisions on the principles of federalism:

. . . *Wheeling* applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation. On the other hand, in the present case, Ohio's classification based on residence operates *against* Ohio residents and clearly presents no state action disruptive of the federal pattern. . . . [A] rational basis [state policy] can be found for this exercise by Ohio of the latitude permitted it to define classifications under the Equal Protection Clause.⁹²

Although the San Francisco ordinance fails to define nonresidents, a court would undoubtedly take judicial notice of the fact that non-resident persons engaged in occupations, trades and professions would not, as a matter of practical necessity, include citizens of other states. The "commuter" in San Francisco resides in adjoining counties. Thus, the holdings of *Travis*⁹³ and *Toomer*⁹⁴ are not directly

⁸⁷ 334 U.S. 385 (1948).

⁸⁸ *Id.* at 396.

⁸⁹ *Id.* at 398.

⁹⁰ 337 U.S. 562 (1949).

⁹¹ 358 U.S. 522 (1959).

⁹² *Id.* at 533.

⁹³ *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).

⁹⁴ *Toomer v. Witsell*, 334 U.S. 385 (1948).

applicable to the commuter tax ordinance. In this connection, it should be noted that the privileges and immunities clause of the fourteenth amendment is not deemed to operate on intrastate action.⁹⁵ Although the California Legislature has reiterated the policy underlying the privileges and immunities clause,⁹⁶ this is a matter of state policy and not of constitutional mandate.⁹⁷ Thus, aside from the California provisions concerning municipalities, the only state or federal constitutional question the ordinance raises is that of equal protection under the laws. Residence is at issue only to the extent it raises the question of unconstitutional classification.

Intrastate Discrimination

The equal protection problem posed by the ordinance is frequently referred to by the courts in terms of "subclassification".⁹⁸ The commuter tax measure divides a constitutionally recognized group⁹⁹—i.e., employees—into resident and nonresident employees and levies the tax *only* on nonresidents. In the narrowest interpretation of arbitrary classification this, without justification, is clearly unconstitutional.¹⁰⁰ The justification offered is that the commuter, in exercising his privilege of employment in San Francisco, uses city services provided with revenue derived from San Francisco residents.¹⁰¹ The narrow question presented is: Does this justification, under equal protection principles, make a patently arbitrary classification, constitutionally acceptable?

In *Louisville Gas and Electric Company v. Coleman*,¹⁰² the United States Supreme Court considered the problem of subclassification.

⁹⁵ *Madden v. Kentucky*, 309 U.S. 83 (1939), *overruling* *Colgate v. Harvey*, 296 U.S. 404 (1935). In *Colgate* a Vermont tax provision that discriminated against state residents by a differential tax treatment of income earned within the state was held to violate the privileges and immunities clause of the 14th amendment.

⁹⁶ Cal. Stats. 1968, ch. 559, § 3 at 1014, *adding* CAL. Gov't CODE § 50026. For the language of this provision, see text accompanying note 59 *supra*.

⁹⁷ See note 85 *supra*.

⁹⁸ *E.g.*, *Gowans v. Bakersfield*, 179 Cal. App. 2d 282, 285, 3 Cal. Rptr. 746, 749 (1960)

⁹⁹ See *Walters v. St. Louis*, 347 U.S. 231 (1954).

¹⁰⁰ If no reasonably justifiable subclassification is or can be made, the operation of the tax must be such as to place liability therefor equally on all members of the group. *Fox Bakersfield Theatre Corp. v. Bakersfield*, 36 Cal. 2d 136, 142, 272 P.2d 879, 883-84 (1950); *Barker Bros. v. Los Angeles*, 10 Cal. 2d 603, 607, 76 P.2d 97, 99 (1938); *Los Angeles v. Lamkersheim*, 160 Cal. 800, 802, 118 P. 215, 216-17 (1911).

¹⁰¹ San Francisco, Cal., Ordinance 246-68, preamble, Aug. 19, 1968: "WHEREAS, The Board of Supervisors finds that non-residents employed by others in San Francisco have not heretofore paid for the services furnished by the taxpayers of San Francisco which such non-residents enjoy."

¹⁰² 277 U.S. 32 (1928).

A Kentucky revenue measure imposing a tax on the privilege of recording mortgages was attacked on the ground that it violated equal protection. The tax was levied *only* on debts secured by mortgages that did not mature within five years. The Court recognized the wide range and flexibility available to the state in classification for tax purposes but pointed out that classification, to escape constitutional objections,

must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.¹⁰³

The subclassification into short and long term loans was held to be unconstitutional:

[O]ne is compelled to pay a tax for the enjoyment of a *necessary* privilege which . . . is furnished to another as a pure gratuity. Such classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. . . . [T]o exact, as the price of a privilege which, for obvious reasons, neither can safely forego, a tax from the latter [long term loans] not imposed *in any degree* upon the former produces an obvious and gross inequality.¹⁰⁴

This holding is clearly applicable to the commuter tax ordinance. No one could argue that the privilege of employment is a less "necessary" privilege than that of recording mortgages. The nonresident employee is, without question, exercising a "necessary privilege" upon which he is taxed and from which his fellow employee who is a resident of San Francisco is entirely exempt. The obvious rebuttal to this which the ordinance suggests is that the privilege is not afforded to San Francisco residents as a "mere gratuity" because they are subject to other forms of taxation. But the reasoning in *Louisville*¹⁰⁵ incorporates two basic principles of constitutional classification which make it clear that such a contention is not sustainable. (1) The wide latitude in classification for tax purposes is limited by the requirement that a valid reason relating to the classification must exist for the court to sustain unlike treatment of persons similarly circumstanced.¹⁰⁶ (2) Although a differential treatment may be sustainable under the broad power of classification for taxing purposes, a degree of disparity so great as to impose a tax on some members of a group and no tax on others similarly circumstanced, is clearly unconstitutional.¹⁰⁷

Justification Offered by the Ordinance

To accomplish its purpose of easing the city budget, the commuter tax ordinance arbitrarily singles out nonresident employees to pay for services furnished by San Francisco taxpayers and enjoyed by

¹⁰³ *Id.* at 37, quoting *Gulf, C. & S.F. Ry. v. Ellis*, 165 U.S. 150, 155 (1897).

¹⁰⁴ *Id.* at 38, 39 (emphasis added).

¹⁰⁵ Note 102 *supra*.

¹⁰⁶ See note 103 *supra*, and accompanying text.

¹⁰⁷ See note 104 *supra*, and accompanying text.

nonresidents, excluding all other nonresidents who are not employees and enjoy these services, as well as all nonresident employees who earn less than \$4000 a year.¹⁰⁸ The ordinance then integrates into a mathematical formula the total income earned in San Francisco,¹⁰⁹ the cost to the city of public services¹¹⁰ and the percentage of commuters to residents,¹¹¹ applying the resulting quotient to the income earned by nonresident employees.¹¹²

The arbitrariness of the measure is emphasized by this formula. First, if the purpose, as stated, is to pay for services enjoyed, a sound mathematical basis would be occupancy in the city. The time spent in the city by the commuter has a direct relationship to the services he uses. The percentage of commuter employees to the total resident population of San Francisco is not a valid mathematical unit to determine an apportionment of costs.

Secondly, the source of revenue to pay for these services is primarily in the form of property taxes.¹¹³ This form of taxation is a concomitant of residence, not of employment. To relieve the property tax burden of the San Francisco resident by taxing the nonresident employee is grossly unfair since the commuter, as a concomitant of residence, pays property taxes in the community in which he lives either as a result of a direct levy on his home or indirectly through the payment of rent. Regardless of this fact, the general proposition that the payment of property taxes is a valid basis for classification is, in any event, negated by a series of California cases dealing with business licensing in which the payment of property taxes has a far more direct relationship to the subject matter of the classification than can be found in the commuter tax ordinance.

¹⁰⁸ San Francisco, Cal., Ordinance 246-68, § 2, Aug. 19, 1968.

¹⁰⁹ *Id.* preamble: "Whereas, adjusted gross income in the form of wages and salaries earned in San Francisco . . . allocated to commuters is \$1,267,000,000 out of a total of \$2,721,000,000;"

¹¹⁰ *Id.*: "Whereas . . . the 1967-68 budget . . . included services to both residents and non-residents at a cost of \$69,623,508 . . ."

¹¹¹ *Id.*: "Whereas, A survey . . . showed 187,600 commuters working in San Francisco."

¹¹² *Id.*: "Whereas, This Board of Supervisors finds that the adjusted gross income in the form of wages and salaries is an equitable factor upon which the commuter should pay his fair share of services. . ."

¹¹³ Sho Sato, *Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce*, 53 CALIF. L. REV. 802 (1965). Letter from Mayor Joseph Alioto to the Board of Supervisors, Mar. 20, 1968, on file Board of Supervisors, Clerk's Office, File No. 238-68-5. This letter in reference to the Mayor's 1968 tax proposals indicates San Francisco's revenue problems: "Last year's [1967] abrupt shift of \$29,000,000.00 from business to homeowners created hardship for many San Franciscans. The shift intensified the already heavy burden of property taxes [O]ver-reliance on the property tax is hard on both the taxpayers and city government. . . ." *Id.*

The foundation case is *Ex parte Haskell*,¹¹⁴ in which a differential license tax as to merchants with or without a fixed place of business was sustained. The court reasoned that, although the ordinance discriminated between classes engaged in the same general business, the methods of doing business were essentially dissimilar. Underlying this determination was a judicial recognition that the costs of conducting a local business included the payment of taxes and other municipal charges from which the itinerant vendor was excluded and that the property taxes were paid in furtherance of the business which was being licensed.

This distinction in the mode of doing business has been broad enough to allow discrimination between businesses located within the city and those located outside. Thus, in *Continental Baking Company v. City of Escondido*,¹¹⁵ a municipal ordinance imposing a license tax of \$50.00 on bakeries located within the city and \$150.00 on bakeries located outside the city, was sustained by the court of appeal. *Continental* seemingly enlarged *Haskell* to include, as a basis for differential taxation, the payment of property taxes by the fixed place of business:

Persons conducting bakeries within the City of Escondido are obliged to pay an *ad valorem* tax to the city on the real and personal property devoted to their businesses. Those engaged in the bakery business elsewhere pay no such tax to the City of Escondido. This fact alone furnishes sufficient justification for imposing a greater license fee upon the latter class.¹¹⁶

But in *Silversten v. City of Menlo Park*,¹¹⁷ the supreme court met and rejected the contention that this was the *Continental* holding:

[T]he appellant attempts to distinguish this case on the ground that the statute [in *Continental*] expressly stated that the local businesses, to pay only the lower fee, were to be on the tax rolls of the city . . . [A]ny such provision may be considered mere surplusage.¹¹⁸

Insofar as *Continental* was not overruled, its reference to property taxes must be taken as dictum. The basis of classification, for the purpose of imposing license taxes in differing amounts remains the different mode of doing business. The law must be taken to be that the payment of property taxes is not a constitutionally acceptable basis of classification. As "mere surplusage," the justification offered by the commuter tax does not obviate its arbitrary classification.

Degree of Disparity

Equal protection does not demand an absolute equality of treatment in classifying for tax purposes.¹¹⁹ If the disparity is not too

¹¹⁴ 112 Cal. 412, 44 P. 725 (1896).

¹¹⁵ 21 Cal. App. 2d 388, 69 P.2d 181 (1937).

¹¹⁶ *Id.* at 393, 69 P.2d at 183.

¹¹⁷ 17 Cal. 2d 197, 109 P.2d 928 (1941).

¹¹⁸ *Id.* at 202, 109 P.2d at 931. (emphasis added).

¹¹⁹ *E.g.*, *State Bd. of Tax Comm'rs v. Jackson*, 283 U.S. 527, 537 (1931).

great an unusual or questionable classification may be sustained.¹²⁰ But the San Francisco ordinance in levying a tax on the privilege of employment and imposing a tax on some members of the class thus created, and no tax on others, evidences a degree of disparity that the courts will not sustain.

For example, in *Bueneman v. City of Santa Barbara*,¹²¹ an ordinance imposing a \$200 yearly license fee on laundries that were doing business in the city but whose plants were located outside and no fee on laundries with local plants was struck down. The supreme court, recognizing differential treatment of similar businesses, defined its limits:

[T]he right to make such distinctions is not broad enough to allow a municipality to tax persons doing a particular kind of business within the city and to *entirely exempt* other persons doing essentially the same kind of business in essentially the same way.¹²²

Similarly, in an early case,¹²³ the supreme court, in invalidating an ordinance subclassifying office buildings by size, enunciated the principle in unequivocal terms:

The legislature has absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and excepting others. . . . This ordinance, therefore, is unjust and discriminatory in . . . imposing upon a class *artificially created*, a burden not *imposed upon all who stand in the same relation to the same subject matter*.¹²⁴

The degree of disparity and the necessity of a reasonable relation between the justification and the classification are overlapping doctrines. They combine in the commuter tax ordinance to result in a discriminatory classification that is arbitrarily directed against non-resident persons employed in San Francisco.

Conclusion

The levy of the commuter tax is not a valid exercise of municipal power to tax. The extraterritorial thrust of the ordinance offends the traditional meaning of municipal affairs, which carries with it the concept of a city functioning as a sovereign entity only within its physical boundaries. To the extent that it is levied only on nonresidents it operates without the built-in considerations of over-all results inherent in any legislation affecting the voting members of a political body. The interests and problems of the persons against whom the tax is directed are of no concern to the taxing authority; nor do the commuters have any voice directly or indirectly in the imposition or administration of the measure. A judicial determination, under these

¹²⁰ *Silversten v. Menlo Park*, 17 Cal. 2d 197, 201-02, 109 P.2d 928, 930-31 (1941).

¹²¹ 8 Cal. 2d 405, 65 P.2d 884 (1937).

¹²² *Id.* at 411, 65 P.2d at 888 (emphasis added).

¹²³ *Los Angeles v. Lankersheim*, 160 Cal. 800, 118 P. 215 (1911).

¹²⁴ *Id.* at 804, 118 P.2d at 217 (emphasis added).

facts, that the "commuter" is a matter of statewide concern would be manifestly just.

Under the safeguards of equal protection, the measure is stripped of its *prima facie* reasonableness and is revealed to discriminate unconstitutionally against nonresidents in favor of residents.

The commuter tax ordinance is an unfortunate choice of vehicle in which to launch a solution to the critical "source of revenue" problem of the municipality.

*Helen Culiner**

* Member, Third Year Class.